Filed 4/5/10 Julia B. v. Superior Court CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JULIA B., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	B221610 (Super. Ct. No. CK76606)

ORIGINAL PROCEEDING; petition for extraordinary writ. Randolph Hammock, Referee. Petition granted and matter remanded.

Children's Law Center of Los Angeles – CLC 1, Sophia Ali and Rosa Figueroa for Petitioner.

No appearance for Respondent.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel and William D. Thetford, Principal Deputy County Counsel, for Real Party in Interest.

Minor Julia B. challenges an order setting a hearing pursuant to Welfare and Institutions Code section 366.26,[1] contending: (1) the waivers of reunification services by Mother Lisa B. and Father Daniel B. were invalid as not knowing and intelligent; and (2) guardianship of Julia with maternal aunt Cecilia B. should have been ordered.

Neither Father nor Mother has filed a petition or is a party to this petition. (Cal. Rules of Court, rule 8.450.)

The juvenile court erred in determining that its conducting of procedures pursuant to sections 300 and 342 relieved it of jurisdiction to appoint Cecilia as legal guardian pursuant to section 360, subdivision (a).

Accordingly, we reverse the setting order and remand the matter to the juvenile court to exercise its discretion to determine whether a guardianship of Julia with Cecilia pursuant to section 360, subdivision (a), should be ordered.

FACTS

Since 1994, Mother has been referred to the Department of Children and Family Services more than 12 times for neglect, emotional abuse, or injury to one or more of her children.[2] In March 2003, Cecilia, Mother's sister, was granted guardianship of Julia's siblings through Probate Court. Julia, born after the Probate Court proceedings were completed, was not included in the Probate Court proceedings.

On March 17, 2009, a section 300 petition was filed as to Mother alleging that Mother exposed Julia and her siblings to drug trafficking, and Mother neglected and endangered the children.

---

[1] All section references are to the Welfare and Institutions Code; all rule references are to the California Rules of Court.

[2]. Julia's siblings, who are not subjects of the within petition, are J.Y.C., born September 1991; J. C., born May 1994; J. B., born November 1995; D-n. B., born May 1999; and D. B., born April 2001.

On May 13, 2009, the juvenile court found that Father was Julia's presumed, noncustodial father.

On June 10, 2009, the juvenile court dismissed the petition as to Julia's five siblings. As Julia's siblings were living with Cecilia pursuant to the Probate Court order, and because Cecilia had often cared for Julia, the juvenile court instituted proceedings to order that Cecilia's guardianship of Julia be established pursuant to section 360, subdivision (a) (hereinafter, sometimes "360(a)"). The Department provided the juvenile court with reports on the suitability of Cecilia's home for Julia.

The Interim Review Report of July 10, 2009, shows that Cecilia lived in a two-bedroom residence and earned approximately $2,800, monthly, from two jobs as a caregiver. Cecilia has two misdemeanor convictions, one in 1991 and another in 1997. The report documents that in 2006 the Department investigated allegations that Cecilia had subjected her biological children, Veronica B. and Anthony T., to substantial risk; the Department's case against Cecilia was closed in 2007. The report notes that Cecilia "appears to be an appropriate caregiver and [Cecilia] has expressed a commitment to provide a long term plan for Julia; however, child, Julia, falls under different placement standards and [Cecilia]'s home would not meet ASFA[**3**] standards as it is too small for the number of children in [Cecilia]'s care should the elder five children be released [to Cecilia]. In addition, [Cecilia] would need a criminal waiver to address two convictions on her live scan."

At the July 10, 2009 hearing, the section 300 petition was sustained against Mother under subdivision (b). Counsel for Mother stated that she waived reunification services "for the purpose of allowing Julia to be placed in a guardianship with her siblings and with the maternal aunt." Father's counsel also agreed to the waiver. The juvenile court granted legal guardianship of Julia to Cecilia.

---

3 "AFSA" stands for the "Adoption and Safe Families Act" (Pub. L. No. 105-89 (Nov. 19, 1997) 111 Stat. 2115), which "set[s] the standards a state is required to meet in order to qualify for federal funding to support ongoing foster care, transitional living for older foster children and other programs necessary for the dependency system to operate. (42 U.S.C.A. §§ 670-675.)" (*In re Stuart S.* (2002) 104 Cal.App.4th 203, 207.)

By the August 21, 2009 hearing, Cecilia had lost her job and her home. The court vacated the guardianship proceedings for Julia and adjudicated the section 300 petition, declaring Julia to be a dependent of the juvenile court. The court continued the matter for a dispositional hearing to determine whether the parents desired reunification services.

On September 18, 2009, the Department filed a subsequent petition pursuant to section 342 as to Father, alleging that Father's criminal history, current incarceration for companion abuse and failure to provide for Julia put her at risk. (§ 300, subds. (b), (g).) At the September 18, 2009 hearing, the juvenile court set another court date to reconsider the guardianship. It ordered no reunification services to Mother, because she had waived services and her whereabouts were unknown.

The October 15, 2009 Addendum Report reflects that Father was incarcerated at Avenal State Prison on a 2007 conviction of inflicting corporal injury on a cohabitant (his then-girlfriend) with a 2004 conviction for obstruction/resisting arrest and a 2004 conviction for felon in possession of a firearm. The court sustained the section 342 petition as to Father, but continued the dispositional hearing to November 9.

At the November 9, 2009 hearing, Father's counsel stated that Father waived reunification services with the understanding that Cecilia would become Julia's guardian. Both Mother and Julia requested guardianship with Cecilia. The court continued the matter again for further assessment and briefing on the issue of its jurisdiction to order a legal guardianship.

The December 9, 2009 Addendum Report includes the section 360(a) guardianship assessment, concluding that Cecilia would be an appropriate legal guardian for Julia:

1. "Due Diligence Search Efforts to locate mother have been unsuccessful" and that Father is incarcerated in Avenal State prison.
2. Mother has had limited contact with Julia and none in the past several months; Father, incarcerated at Avenal State Prison, has not had contact with Julia since 2007.
3. Julia is developing appropriately for her age.

4. Cecilia has completed the necessary documents for processing of a Criminal Waiver. Only after that is processed will the Department refer her home for an initial AFSA assessment. Cecilia pays $1,000 per month for her apartment; she receives $1,063 per month from CALWORKS, a monthly unemployment check of $900, and $147 in food stamps per month.
5. Julia has a good relationship with Cecilia, who has taken care of Julia in the past. Julia has reported that she is happy in the care of Cecilia and with her siblings.
6. Cecilia is the only relative who has expressed interest in caring for Julia. The report states: "DCFS finds the permanent plan of legal guardianship to be the best plan for the child, Julia, as it is unlikely Julia would be adopted by any other relative should parental rights be terminated."

The report concludes that, if Cecilia's home were to be AFSA approved, then the Department would agree to a permanent plan of legal guardianship of Julia.

At the January 8, 2010 hearing, the court, stating that it had no jurisdiction to grant a guardianship after the sustaining of a section 342 petition, set a permanency planning hearing pursuant to section 366.26.

DISCUSSION

Waiver of reunification services

The issue of waiver of reunification services is itself waived by the failure of Mother and Father (both of whom remain represented by counsel) to timely file a petition under rules 8.450, and 8.452, to challenge the setting of the section 366.26 hearing.[4]

Furthermore, Julia has no standing to challenge the validity of the waiver on behalf of either parent. (§ 361, subd. (b).)

Additionally, due diligence search efforts having been unsuccessful in ascertaining the whereabouts of Mother, we agree with Department that reunification services need not be provided to her. (§ 361.5.)

---

[4] It is now too late to file such a petition. (Rule 8.450.)

Guardianship

We now find the juvenile court erred in determining that it had no authority to order a guardianship after having *sustained* a section 342 petition.

A section 360(a) guardianship is a disposition in which all agree that guardianship with a certain person is proper for the minor. Section 360 provides: "After receiving and considering the evidence on the proper disposition of the case, the juvenile court may enter judgment as follows:

"(a) Notwithstanding any other provision of law, *if the court finds that the child is a person described by Section 300* and the parent has advised the court that the parent is not interested in family maintenance or family reunification services, it may, *in addition to* or in lieu of *adjudicating the child a dependent child of the court,* order a legal guardianship, appoint a legal guardian, and issue letters of guardianship, if the court determines that a guardianship is in the best interest of the child, provided the parent and the child agree to the guardianship, unless the child's age or physical, emotional, or mental condition prevents the child's meaningful response. The court shall advise the parent and the child that no reunification services will be provided as a result of the establishment of a guardianship. The proceeding for the appointment of a guardian shall be in the juvenile court. [¶] . . . [¶] No person shall be appointed a legal guardian under this section until an assessment as specified in subdivision (g) of Section 361.5 is read and considered by the court and reflected in the minutes of the court. The assessment shall include the following: [¶] (1) Current search efforts for, and notification of, a noncustodial parent in the manner provided in Section 291. [¶] (2) A review of the amount of and nature of any contact between the child and his or her parents since the filing of the petition. [¶] (3) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status. [¶] (4) A preliminary assessment of the eligibility and commitment of any identified prospective guardian, particularly the caretaker, to include a social history including a screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of guardianship. [¶]

(5) The relationship of the child to any identified prospective guardian, the duration and nature of the relationship, the motivation for seeking guardianship, and a statement from the child concerning the guardianship, unless the child's age or physical, emotional, or other condition precludes the child's meaningful response, and if so, a description of the condition. [¶] (6) An analysis of the likelihood that the child would be adopted if parental rights were terminated." (Italics added.)

The juvenile court erred in concluding that it had no jurisdiction to order a section 360(a) guardianship after an *adjudication* hearing. To the contrary, section 360(a) expressly provides that a guardianship may be ordered "*in addition to . . . adjudicating the child a dependent child of the court*."

There was no *disposition* of either the section 300 or section 342 petition prior to January 8, 2010.[5] Even though the juvenile court stated at various hearings (including the hearing of November 9, 2010), that it would conduct a dispositional hearing, the hearings were postponed. Finally, at the January 8, 2010 hearing, the juvenile court issued the dispositional order. Contrary to its statements at that hearing, it retained jurisdiction to implement a guardianship at that dispositional hearing.

Rule 5.695 sets forth, in pertinent part, what the court may do at a dispositional hearing:

"(a) At the disposition hearing, the court may: [¶] . . . [¶]

"(3) Appoint a legal guardian for the child;

"(4) Declare dependency and appoint a legal guardian for the child. [¶] . . . [¶]

"(b) Appointment of a legal guardian (§ 360)

---

5 A section 360(a) guardianship may not be implemented without a determination that a minor is a person described in section 300. A section 342 petition, when sustained, determines that "the minor is a person described in Section 300." A 360(a) guardianship requires the minor to be "a person described by Section 300." Section 342 expressly states that the procedures regarding a section 342 petition are the same as those governing a section 300 petition. (§ 342.)

"(1) At the disposition hearing, the court may appoint a legal guardian for the child if:

"(A) The parent has advised the court that the parent does not wish to receive family maintenance services or family reunification services;

"(B) The parent has executed and submitted *Waiver of Reunification Services (Juvenile Dependency)* (form JV-195);

"(C) The court finds that the parent, and the child if of sufficient age and comprehension, knowingly and voluntarily waive their rights to reunification services and agree to the appointment of the legal guardian; and

"(D) The court finds that the appointment of the legal guardian is in the best interest of the child.

"(2) If the court appoints a legal guardian, it must:

"(A) State on the record or in the minutes that it has read and considered the assessment;

"(B) State on the record or in the minutes its findings and the factual bases for them;

"(C) Advise the parent that no reunification services will be offered or provided;

"(D) Make any appropriate orders regarding visitation between the child and the parent or other relative, including any sibling; and

"(E) Order the clerk to issue letters of guardianship, which are not subject to the confidential protections of juvenile court documents as described in section 827.

"(3) The court may appoint a legal guardian without declaring the child a dependent of the court. If dependency is declared, a six-month review hearing must be set."

The procedure for a section 342 petition is set forth in rule 5.565(e), which provides: "The hearing on a subsequent or supplemental petition must be conducted as follows:

"(1) The procedures relating to jurisdiction hearings prescribed in chapter [12], article 2 apply to the determination of the allegations of a subsequent or supplemental

petition. At the conclusion of the hearing on a subsequent petition the court must make a finding that the allegations of the petition are or are not true. At the conclusion of the hearing on a supplemental petition the court must make findings that: [¶] (A) The factual allegations are or are not true; and [¶] (B) The allegation that the previous disposition has not been effective is or is not true.

"(2) The procedures relating to disposition hearings prescribed in chapter [12], article 3 apply to the determination of disposition on a subsequent or supplemental petition. If the court finds under a subsequent petition that the child is described by section 300(a), (d), or (e), the court must remove the child from the physical custody of the parent or guardian, if removal was not ordered under the previous disposition."

Illustrative is *In re L.A.* (2009) 180 Cal.App.4th 413, in which the appellate court determined that the conducting of a dispositional hearing did not bar the subsequent implementation of a section 360(a) guardianship. Father appealed from a juvenile court dispositional order removing the children from his home, placing them in the custody of their paternal grandparents, and ordering family reunification services for both Father and Mother. Father contended that the court erred in refusing his request to order a section 360(a) guardianship for the children, because noncustodial Mother had not waived reunification services. The appellate court concluded that the juvenile court had the discretion to order the guardianship. (*Id.* at pp. 418–419.) In that case, "by the time of the disposition hearing, the children had been living in the home of their paternal grandparents for some 20 months, their father was incarcerated, and the whereabouts of their mother were unknown, although she had been in sporadic contact with the children and the social worker. At the disposition hearing, once the father and counsel for the children agreed to a guardianship, the court had the authority to order a legal guardianship and a continuance of the hearing so that an assessment report could be prepared by the Department that would include all the information set forth in section 360, subdivision (a). Only after the court read and considered the assessment, which must include information on the attempts of the Department to contact and receive a waiver of reunification services for the children's mother, could the court appoint the

paternal grandparents, or any other person or persons, as the children's legal guardians and issue letters of guardianship. (§ 360, subd. (a).)

"The juvenile court here declined to order a guardianship, a continuance, and the preparation of an assessment report, and instead ordered reunification services for both parents. '"[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion in it vested by law. [Citations.]" [Citation.] "Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]" [Citation.]' [Citation.] 'The fundamental liberty interest of natural parents in the care, custody, and management of their child[ren] does not evaporate simply because they have not been model parents or have lost temporary custody of their child[ren] to the State.' [Citation.] Father here was entitled to waive services and request that the court order a legal guardianship for his children. It appears from the record that in ordering reunification services for both parents the court believed it did not have the discretion to order a legal guardianship as requested by father and the children and the preparation of an assessment report as the mother had not yet explicitly waived her right to reunification services. Accordingly, we will reverse the dispositional order and remand the matter for a new disposition hearing to allow the court to exercise its discretion to order a legal guardianship and the preparation of an assessment report as specified in section 360, subdivision (a)." (*In re L.A.*, *supra*, 180 Cal.App.4th at p. 428.)

The Department cites *In re Summer H.* (2006) 139 Cal.App.4th 1315, in support of its position that a guardianship must be determined at the earliest possible moment. When Summer was born in June 2005, both she and her mother tested positive for cocaine. A long-term cocaine abuser, Summer's mother requested that Summer be placed with Christie P., who was the legal guardian of Summer's older sibling. Christie had a criminal history and requested an exemption pursuant to section 361.4. In January 2006, the juvenile court found Summer was a person described by section 300 and sustained the petition. Stating that it could not appoint Christie as guardian because

of her criminal conviction, the juvenile court denied the request of Summer's mother to appoint Christie as Summer's guardian. Summer's mother sought review of the denial order.

Division Seven of our court held that "the appointment of a legal guardian under section 360 is not subject to the criminal records exemption requirement of section 361.4." (*In re Summer H., supra,* 139 Cal.App.4th at p. 1334.) In setting forth the statutory background for its decision, the appellate court stated: "As an alternative to removing the child from the physical custody of his or her parent and placing the child in the foster care system, section 360 and California Rules of Court, rule 1456(b) authorize the juvenile court at the disposition hearing to appoint a legal guardian if the parent has advised the court he or she does not wish to receive family maintenance or family reunification services and agrees to the guardianship and the court finds, after consideration of all of the evidence, including a review of the proposed guardian's criminal history, that the guardianship is in the child's best interests." (*In re Summer H., supra,* 139 Cal.App.4th at p. 1321, fn. omitted.) The appellate court further noted: "Added by the Legislature to former section 360 in 1994 (Stats.1994, ch. 900, § 1, p. 4531), subdivision (a) of section 360 was intended to create a new and alternative procedure for appointing a guardian when the parent acknowledges early in the dependency proceedings that he or she cannot, and will not be able to, even after family reunification services, provide adequate care for the child. As the author of the bill to add current subdivision (a) to section 360 observed, '[T]he dependency process needs tools that fit a variety of family situations. [U]nder current law the court may only grant a guardianship after 12 to 18 months of reunification services have been provided to the parents, and reunification has failed. [W]here the parent chooses to continue in a lifestyle that keeps [him or her] separated from the child, the court should have the option of granting the guardianship at an earlier stage, thus providing for more stability for the child.' (Legis. Counsel's Dig., Sen. Bill No. 1407 (1993-1994 Reg. Sess.) as amended June 23, 199.)" (*In re Summer H., supra,* 139 Cal.App.4th at p. 1325.)

What this language of *In re Summer H.* means is that a section 360(a) guardianship is a shortcut to stability for a minor whose parents cannot or will not care for the minor. In contrast with Summer H.'s mother, Mother and Father in the instant matter sought guardianship for Julia with Cecilia from the outset.

The Department's reliance on *In re G.W.* (2009) 173 Cal.App.4th 1428 is misplaced. There, a section 387 supplemental petition was filed; after the sustaining of such a petition, rule 5.565(f) *requires* the juvenile court to set a section 366.26 hearing. There was no section 387 supplemental petition filed as to Julia.

In *In re G.W.*, the grandparents became the legal guardians of G.W.'s three oldest siblings in 2004. The guardianship was terminated in April 2006 because of grandfather's criminal history, and the children were sent back to Mother. Mother retained custody of the children until June 2006, when the agency filed a section 300 petition alleging that the four oldest children were at risk because mother failed to supervise or protect them adequately. Mother was provided with reunification services. Soon, however, a supplemental petition pursuant to section 387 was filed. At the dispositional hearing, the juvenile court appointed stepgrandmother the legal guardian for all the children except L.W. (*In re G.W.*, *supra*, 173 Cal.App.4th at pp. 1434–1435.) The agency appealed from the order appointing stepgrandmother the legal guardian of the five children.

The appellate court reversed the order: "Although there is no reference in section 387 to the dispositional hearing, the rules of court specifically provide for the disposition after a supplemental petition is granted. Rule 5.565(f) states, '*If a dependent child was returned to the custody of a parent or guardian* at the 12-month review or the 18-month review or at an interim review between 12 and 18 months *and a [section] 387 petition is sustained and the child removed once again, the court must set a hearing under section 366.26* unless the court finds there is a substantial probability of return within the next 6 months or, if more than 12 months had expired at the time of the prior return, within whatever time remains before the expiration of the maximum 18-month period." (*In re G.W.*, *supra*, 173 Cal.App.4th at p. 1438; italics added.)

The appellate court distinguished *Summer H.*: "We have thoroughly analyzed *Summer H.* to point out the obvious inapplicability of its analysis to this case. The court in *Summer H.* found compelling the ability of a parent to decide at the earliest stage of the dependency proceeding, when it became clear that intervention was inevitable, to recognize his or her inability to parent a child successfully, give up that right, and assist in choosing a legal guardian for that child. Clearly, that situation is not present here.

"Mother went through 18 months of reunification efforts (reunification for both fathers was terminated at the 12-month review), regained custody of her children for a few days, and then again had the children removed from her home. Mother did not, at an early stage of the proceedings, refuse reunification services and request the children be placed with stepgrandmother. Therefore, even if we accept without question the analysis in *Summer H.*, it is inapplicable to this case because mother's decision to agree to have stepgrandmother appointed the legal guardian for the children came only after she exhausted all her attempts to retain custody of the children." (*In re G.W.*, *supra*, 173 Cal.App.4th at p. 1443.)

The appellate court concluded: "Unlike the mother in *Summer H.*, mother did not advise the juvenile court at the initial disposition that she wished to have stepgrandmother appointed the legal guardian of the children. Nor did mother waive the right to services. Instead, she received family reunification services for 18 months. Mother's request for guardianship did not occur at an early stage of the proceedings, but instead occurred only after the children had been placed in foster care for an extended period of time.

"We need not decide whether we think *Summer H.*'s analysis should be limited to the first dispositional hearing on an original petition, or any other possible limitations. We hold only that the *Summer H.* analysis does not apply at the disposition of a supplemental petition. Therefore, the trial court here was obligated to comply with section 361.4 when it placed the children in a legal guardianship, and it erred when it failed to do so." (*In re G.W.*, *supra*, 173 Cal.App.4th at p. 1444.)

The procedural history of *G.W.* was completely different from that in *Summer H.*, and is completely different from the procedural history here. First, in *G.W.*, the children were placed with Mother, who tried and failed at reunification services. Here, both of Julia's parents waived reunification from the beginning.

In *G.W.*, a section 387 petition was sustained. Here, there was a section 342 petition sustained. The sustaining of these two very different petitions leads to two very different results. After a section 387 petition is sustained, as it was in *G.W.*, the juvenile court has no authority but to proceed to a section 366.26 hearing. Rule rule 5.565(f) requires the setting of a section 366.26 hearing pursuant upon the sustaining of a section 387 petition: "If a dependent child was returned to the custody of a parent or guardian at the 12-month review or the 18-month review or at an interim review between 12 and 18 months and a 387 petition is sustained and the child removed once again, the court must set a hearing under section 366.26 unless the court finds there is a substantial probability of return within the next 6 months or, if more than 12 months had expired at the time of the prior return, within whatever time remains before the expiration of the maximum 18-month period."

There is no such requirement for a hearing under section 366.26 after the sustaining of a section 342 petition.

CONCLUSION

The parents waived reunification services. Now, all that is left is for the juvenile court to exercise its discretion to determine whether a new assessment should be ordered and then to exercise its discretion to determine whether a 360(a) guardianship of Julia with Cecilia should be ordered.

DISPOSITION

The order of January 8, 2010 setting a hearing pursuant to Welfare and Institutions Code section 366.26 is reversed, and the matter is remanded to the juvenile court for further proceedings consistent with the views expressed herein.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.